

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PHILLIP L. ROSLANIEC,

Plaintiff-Appellee,

v

DIANE E. MILLS,

Defendant-Appellant.

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UNPUBLISHED

June 19, 2008

No. 274603

Kent Circuit Court

LC No. 04-07008-DO

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right from a judgment of divorce. Because the trial court did not clearly err in its post judgment opinion regarding allocation of the deficiency on the sale the Deer Haven property, did not clearly err when it valued the Thornapple property using the state equalized value (SEV) assigned to the property, and did not clearly err when it awarded a portion of attorney's fees to plaintiff for post-judgment litigation, we affirm.

I

The parties were married on October 20, 2001 and plaintiff filed for divorce on July 21, 2004. Plaintiff, an internist, was approximately 50 years old, and had two sons from a prior marriage at the time of the divorce. Defendant, an engineer, was in her mid-forties, and had three daughters from a prior marriage at the time of the divorce. At the time of the marriage, plaintiff owned a home on Thornapple River Drive in Grand Rapids and defendant owned a home on Yarrow in Grand Rapids. Defendant sold her premarital home on Yarrow in July 2002 after the parties completed significant renovations on it. Defendant retained profits in the amount of \$440,000 after the sale of the property. Thereafter, both parties and some of the parties' children moved into plaintiff's premarital home on Thornapple. The parties made substantial changes and improvements to the Thornapple home to accommodate the blended family as well as defendant's design choices. During 2003 the parties began to look at properties off and on because, at least in part, defendant's daughters felt the Thornapple house was too small and were not happy. The parties saw a property located on Deer Haven Street but believed it was overpriced and needed a lot of work.

About a year later the Deer Haven property was still on the market and the parties decided to make an offer on it. The parties had been having increasing disagreements especially concerning money at this point in the marriage. Plaintiff wanted to back out of the Deer Haven

offer after the home inspection. Defendant wanted to move forward with the purchase because she hoped it could be a fresh start for the couple. Both parties contributed money toward the down payment on the Deer Haven property and the parties closed on the property on July 15, 2004. Movers were scheduled for July 23, 2004. But in the mean time, plaintiff filed for divorce on July 21, 2004 and did not move into the Deer Haven residence. Defendant and her children moved into the Deer Haven residence taking with them nearly all the furnishings and some fixtures from the Thornapple property.

The divorce proceeded and defendant did not want to continue to reside in the Deer Haven property. Thus, the judgment of divorce ordered the Deer Haven property sold. In a protracted process, the parties listed the property for sale with the assistance of the trial court. Even after the divorce trial and the trial court entered the judgment of divorce on September 2, 2005, the property remained on the market for an extended period of time. The trial court retained jurisdiction on the matter in order to allocate any profit or loss at the time of the sale. Defendant continued to reside in the Deer Haven residence the entire time it was on the market and at some points caused delays in its sale. The property eventually sold at a significant deficit. After a post-trial evidentiary hearing held on September 14, 2006, the trial court allocated the mortgage deficit and various expenses related to the ownership of the Deer Haven property between the parties and resolved the last issues in the case. This appeal followed.

## II

“In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings.” *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). The appellate standard of review for matters of property distribution is twofold. First, this Court must review the trial court’s findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if the appellate court, on all of the evidence, is left with a definite and firm conviction that a mistake has been made. *Draggo v Draggo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). We give special deference to a trial court’s findings when they are based on the credibility of the witnesses. *Id.* Second, if the trial court’s findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152. “The court’s dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable.” *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

## III

Defendant first argues that the trial court clearly erred in its post judgment opinion regarding allocation of the deficiency on the sale the Deer Haven property. Defendant specifically argues that the “25%/75% split of the costs was far from equal” and that the trial court did not explain its reasoning for diverging from equality. Plaintiff counters that the trial court properly allocated the expenses associated with the Deer Haven property because defendant and her children enjoyed exclusive possession of the residence at the time any expenses were incurred and because defendant was not required to pay plaintiff back for his portion of the down payment on the property.

Our review of the record reveals that the trial court held an extremely lengthy evidentiary hearing where it heard testimony from both parties and argument from counsel regarding the

allocation of costs associated with the Deer Haven property. The trial court also required the parties to submit summary statements detailing the costs involved. At the close of the hearing, the trial court concluded that the decision to purchase the Deer Haven property was a “financially disastrous decision made by both [parties] and that both parties will share in the financial pain . . . that goes along with the ownership of the home.” The trial court then individually addressed each debt listed on the parties’ summaries and allocated the various costs as it found appropriate.

The trial court first addressed plaintiff’s request for repayment of \$22,398.84 that he contributed toward the down payment on the Deer Haven property. The trial court determined that defendant should not repay plaintiff any portion of the \$22,398.84 down payment he contributed, holding in essence, that plaintiff should be held accountable for his share of the poor financial decision to purchase the property during the marriage. The trial court also held that plaintiff and defendant would equally share in all of the property taxes incurred throughout the entire time the parties’ owned the property.

Regarding repair and renovation issues, the trial court individually addressed numerous items and ultimately found that the parties should share in any repair or renovation costs that: were contemplated when the parties purchased the property, were contracted prior to closing, or were related to the inspection report. These costs included: changing the locks, moving costs, water treatment, certain environmental and engineering charges, carpeting contracted prior to closing, plumbing and fungal assessments, furnace repair, light replacement, hot water heater replacement, handy man charges, phone installation, air quality control, tree removal, and home insurance deductible. The trial court also determined that the parties should share in certain costs associated with readying the property for sale. The trial court acknowledged that the parties had agreed to share in certain expenses related to the property, including those expenses incurred to market and improve the property for sale.

The trial court then individually tackled expenses defendant incurred while she was in possession of the property. The trial court held that defendant was solely responsible for those expenses related to general home maintenance while she exclusively lived in the house. In particular, the trial court found that defendant was responsible for the following expenses: water softener treatment, internet service hook-up, invisible fence installation, personal decoration expenses including wall preparation and painting, certain plumbing expenses, general furnace upkeep and repair, pool table set-up, lawn service, snow removal service, Lowes and Best Buy bills, cleaning fees, dishwasher repair, humidifier repair, and gas and electric bills.

The trial court addressed late fees and interest added to the mortgage as a result defendant’s late or non-payment of monthly mortgage expenses on the Deer Haven property in contravention of the court’s order. The trial court reviewed mortgage documentation related to the fees and found them to be defendant’s sole responsibility. The trial court also addressed the outstanding mortgage principal and interest owing on both the primary and secondary mortgages due to the deficiency on the house sale. Finding that the total principal and interest owed was \$61,530, the trial court ordered plaintiff to “contribute 25 percent of these bills to assist [defendant] with the payment of this marital property” in the amount of \$15,383.

In her brief on appeal, defendant specifically asserts that the trial court’s “25/75 split of the costs was far from equal” and that the “trial court did nothing to explain the divergence from

congruity.” “In dividing marital assets, the goal is to reach an equitable division in light of all the circumstances.” *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division of property is not governed by a rigid set of rules and the determination of relevant factors will vary with the facts and circumstances of each case. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

At the outset, defendant’s characterization of the property disposition as “75%/25%” is not supported by the record. The record plainly shows that plaintiff supplied a down payment in the amount of \$22,398.84 for the Deer Haven property, paid 50% of all repair and renovation costs contemplated when the parties purchased the property, 50% of the property taxes, and 50% of the costs associated with marketing and selling the property, and 25% of the mortgage deficit. Significant also is the fact that although the parties purchased the Deer Haven home during the marriage, the home never served as the parties’ marital home. Plaintiff never lived in the property and instead remained in the Thornapple residence and was solely responsible for mortgage payments and upkeep on that property. To the contrary, defendant and her daughters promptly took exclusive possession of the property after closing. There is evidence in the record that defendant took nearly all of the furniture and some fixtures from the Thornapple property when she moved into the Deer Haven property. Defendant remained at the property until it was sold nearly a year after the judgment of divorce. The trial court found that defendant was somewhat uncooperative in the sale of the property and that her actions resulted in “difficulties related to the sale” and “delay and additional costs in the matter.” There is testimony in the record that defendant had a thorny relationship with realtors contracted to sell the property, had various issues with the asking price, and denied showings of the property.

After reviewing the circumstances in this case, and giving “special deference to [the] trial court’s findings when they are based on the credibility of the witnesses” *Draggoo, supra* at 429, we are not left with a firm conviction that the court’s dispositional ruling was inequitable in light of the facts of the case. *Pickering, supra* at 7. When considering that defendant and her children enjoyed exclusive use of the property and defendant in fact stalled the sale of the home by her actions, plaintiff did not recoup any of his initial down payment on the property and shared equally in many expenses related to home repairs and renovations, and contributed 25% to the mortgage despite never living there and maintaining his own residence, we conclude that the trial court’s dispositive ruling was fair and equitable. *Draggoo, supra* at 429.

#### IV

Next, defendant challenges the trial court’s adoption of the value of the Thornapple property. In particular, defendant argues the trial court clearly erred when it did not use the appraised value of the Thornapple property and instead used the state equalized value (SEV) assigned to the property. Defendant alleges further error by the trial court’s failure to award her a portion of the improvements made to the property during the marriage. Plaintiff counters that the trial court properly valued the Thornapple property based on the SEV because the appraisals did not match the valuation dates selected by the trial court.

The trial court’s valuation of assets is reviewed for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Draggoo, supra* at 429. “The trial court may, but is not required to, accept either parties’ valuation evidence.” *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). Where marital assets are valued between divergent estimates, the trial

court has great latitude in arriving at a final figure. *Id.* at 26. The trial court is in the best position to judge the credibility of the witnesses. *Id.* “[W]here a trial court’s valuation of a marital asset is within the range established by the proofs, no clear error is present.” *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

Regarding the valuation of the Thornapple property, the trial court found as follows:

[Defendant] asserts a marital interest in the Thornapple River Drive property and asks the Court to assess her marital interest in that home.

The Court would note that although the marriage occurred in 2001, this was clearly a premarital asset. And [defendant’s] name was not added to the deed of the Thornapple property until 2002, probably because that’s when the parties moved into the home, and that’s when renovations began in the home to accommodate [defendant’s] and her three children.

The Court seeks to evaluate whether there has been an increase in the property at Thornapple River Drive.

In reviewing the entire file, it appears to the Court that three appraisals have occurred on this property. There was an appraisal done on the Thornapple property in September of 2003 for \$450,000.00. There were also competing appraisals performed in 2005, by both the plaintiff and defendant.

The plaintiff placed the value of the home at \$508,000.00 in 2005. The defendant’s appraisal placed the value at \$535,000.00.

The Court believes that it is appropriate to evaluate the increase in the value of the home from the time [defendant’s] name was added to the deed until the date that [defendant] vacated the property. So, the Court seeks to evaluate the increase in the value of the home from 2002 through 2004.

I would prefer to use appraisals if we had two appraisals. We do not have an appraisal in the property – for the property in 2002. Therefore, in the Court’s opinion, it is inappropriate to compare apples to oranges, if you will. That is to look at an SEV and then look at an appraisal value.

And, the Court would note that we don’t even have an appraisal for 2004. They exist in 2003 and 2005.

So, the Court in valuing the increase in value of the Thornapple River Drive property look[s] to the SEV values. The SEV value for the Thornapple River Drive property in 2002 was \$203,000.00. The SEV in 2004 is \$222,000.00. This yields a net increase in the property of \$38,000.00.

This Court finds that [defendant] is entitled to one half of this increase in value, which would be a total of \$19,000.00.

For the purpose of dividing marital property, assets typically are valued at the time of trial or at the time judgment is entered. In determining the valuation date, however, the trial court retains considerable discretion to see that equity is done by valuing the asset as of either the date of trial, the date of judgment, or a more appropriate date. *Byington v Byington*, 224 Mich App 103, 114, n 4; 568 NW2d 141 (1997). An abuse of discretion occurs when a court chooses an outcome that is not within the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The court properly may consider manifestations of intent to lead separate lives when apportioning the marital estate. *Byington, supra* at 113-114.

After reviewing the record, we are not persuaded that the trial court abused its discretion when it determined the appropriate valuation dates to be 2002 and 2004. Though the parties were married in 2001, defendant's name was not added to the Thornapple property deed until 2002, and, in 2004 defendant vacated the Thornapple property and began living at the Deer Haven property. Thus, the valuation dates of 2002 and 2004 fall within the range of principled outcomes and do not represent an abuse of the court's discretion. *Maldonado, supra* at 388.

Further, the court's use of the SEV values was not error. Defendant's argument that the trial court should have used appraisals to value the residence fails because no appraisal values were available for 2002 and 2004. "The general rule applicable to valuation of marital assets is that the party seeking to include the interest in the marital estate bears the burden of proving a reasonably ascertainable value . . . ." *Wiand v Wiand*, 178 Mich App 137, 149; 443 NW2d 464 (1989). The trial court stated that it would rather use appraisals to arrive at the proper valuation of the property, but none were available for 2002 and 2004. Thus, the record is plain that defendant did not satisfy her burden of proving the property's reasonably ascertainable value at the appropriate time frame through the use of appraisals. Because of the lack of appropriate appraisals or other evidence on the record, the trial court did not err in using the available SEVs to determine the increase in value of the Thornapple property during the appropriate time frame. As a result, the trial court's ultimate determination of the property value was within the range established by the proofs. Therefore, the trial court did not clearly err in its valuation of the Thornapple property.

Defendant also argues that the trial court erred when it did not award her a portion of the value of the improvements made to the Thornapple property during the marriage. Defendant asserts that testimony showed that her improvements to the property totaled \$170,000 to \$180,000 and the trial court erred when it did not credit her any of that value. The trial court directly addressed this issue and held as follows:

There are claims that there have been improvements in the home of \$170,000.00 to \$180,000.00. And, that [defendant] claims that these improvements to the home were necessary and funded primarily by her income sources from her premarital assets, and through her earnings.

[Plaintiff] disputes that and says, well, there were modifications made to the home, but they were unnecessary, extravagant, overpriced and did little to improve the value of the home.

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The Court is not persuaded that [defendant] should be reimbursed for the \$170,000.00 to 180,000.00 in improvements. I don't find that this is a case where [plaintiff] tricked [defendant] into taking that money out, or spent the money on improvements without her consent or approval. These were, in the Court's opinion, joint marital decisions about the spending of money.

In retrospect, each of us may have our own opinions as to whether that was wise, or if it was financially beneficial at the end of the day, but I don't find that there was any wrongdoing, any manipulation, anything that would require that the Court should have [plaintiff] compensate [defendant] for the spending of these improvements.

After reviewing the record, and giving deference to the trial court's special opportunity to assess the credibility of the witnesses, we decline to disturb the trial court's findings on issues related to the improvements made to the Thornapple property, plaintiff's premarital home. This is especially the case considering that there was also testimony on the record that during the marriage the parties also made substantial improvements to the Yarrow property, defendant's premarital home. The trial court found that the improvements made to the Yarrow property during the marriage totaled approximately \$60,000 to \$80,000. When the Yarrow property sold in 2002 after the parties married and made improvements, defendant received all of the equity from the sale in the amount of \$440,000. The trial court held that plaintiff was not entitled to any of the increase in value of the Yarrow residence due to the improvements made during the marriage and held likewise for plaintiff's request to receive monies as a result of the improvements to the Thornapple property. After reviewing the record in light of these facts, we conclude that the dispositive ruling was fair and equitable and defendant's argument fails. *Sparks, supra* at 151-152.

## V

Defendant argues that that the trial court clearly erred in awarding attorney's fees to plaintiff for post-judgment litigation. In particular, defendant asserts that the trial court abused its discretion by awarding attorney fees on the basis of defendant's unreasonable conduct without specifically finding that defendant's misconduct caused plaintiff to incur the fees awarded. Defendant also argues that the award was error because plaintiff submitted no evidence regarding what fees were actually incurred as a result of defendant's misconduct. Plaintiff's position is that the trial court properly awarded attorney fees in the post-judgment litigation. Plaintiff specifically argues that he was forced to incur legal fees as a direct result of defendant's unreasonable and dilatory conduct during the proceedings and that he did provide evidence substantiating the cause of as well as the reasonableness of the fees incurred.

"We review a trial court's grant or denial of attorney fees for an abuse of discretion." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 895 (2005). Any findings of fact the trial court used to support its award are reviewed for clear error, but questions of law are reviewed de novo. *Id.* Generally, a party in a domestic relations matter may recover reasonable attorney fees if he or she is unable to bear the expense of attorney fees and the other party is able to pay. *Id.*; MCR 3.206(C). But attorney fees also may be authorized when the party requesting them has been forced to incur expenses as a result of unreasonable conduct during the divorce

proceedings.<sup>1</sup> MCR 3.206(C); *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

The record does not support defendant's assertion that the trial court abused its discretion by awarding attorney fees on the basis of defendant's unreasonable conduct without specifically finding that defendant's misconduct caused plaintiff to incur the fees awarded. To the contrary, the record displays that the trial court made particular findings regarding fees incurred as a result of defendant's unreasonable conduct during the post-judgment divorce proceedings. The trial court found particularly that defendant caused difficulties related to the sale of the Deer Haven property during the post-judgment divorce proceedings. The trial court stated that it relied on "testimony that [it] heard with regard to the sale of the marital home." Clearly the trial court credited the testimony in the record that defendant was somewhat uncooperative with realtors contracted to sell the property, had various issues with the asking price, and denied showings of the property. After reviewing the record, and according the trial court the appropriate deference, we do not conclude that the trial court's findings were clearly erroneous. As such, we decline to disturb the trial court's holding that defendant acted unreasonably, and as a result should be responsible for 25% of the additional costs and attorney fees in the matter.

Further, the record does not support defendant's assertion that because plaintiff submitted no evidence regarding what fees were actually incurred as a result of defendant's misconduct, the attorney fee award was error. "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed, supra* at 166. Here, the record displays that during the evidentiary hearing on September 14, 2006, the trial court heard evidence regarding the requested post-judgment attorney fees. Plaintiff testified that he had incurred attorney fees in the amount of \$12,260 since the time the divorce case was tried. The trial court received as evidence a copy of the itemized attorney fees incurred post divorce judgment while the Deer Haven property was listed on the market for sale. Plaintiff also testified that additional attorney fees were incurred as a result of subpoenas issued for defendant's bank records, attendance at numerous hearings scheduled by defendant in the matter, and costs associated with defendant's not complying with subpoenas.

Plainly, the record contradicts plaintiff's claims that defendant submitted no evidence regarding the amount of attorney fees he actually incurred as a result of plaintiff's alleged misconduct. To the contrary, after reviewing the record, it is clear that the trial court assessed the evidence before it and properly "determine[d] what services were actually rendered, and the reasonableness of those services" before it ruled on attorney fees. *Reed, supra* at 166. It further appears that the trial court took this evidence into account when it held that defendant acted unreasonably and for that reason, directed her to pay 25% of the additional attorney fees

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<sup>1</sup> Under the "American rule," attorney fees are generally not recoverable. *Reed, supra* at 164. A trial court may impose an attorney fees award, however, if expressly authorized by statute, court rule, common-law exception, or contract. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002).



incurred. After reviewing the record, we conclude that the trial court did not clearly err in awarding attorney's fees to plaintiff for post-judgment litigation.

Affirmed.

/s/ Pat M. Donofrio  
/s/ David H. Sawyer  
/s/ William B. Murphy